74-1252

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1252

EDWARD WRAY CROCKETT, JR., EDWARD WRAY CROCKETT, III., PLEASANT HENRY PARTIN, MARCUS RANDOLPH MARTIN, ROWEN EUGENE BROWN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

EDWARD WRAY CROCKETT, JR., EDWARD WRAY CROCKETT, III., PLEASANT HENRY PARTIN, MARCUS RANDOLPH MARTIN, EDWIN EUGENE BROWN, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 17, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix A hereto, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1975. The Court of Appeals permitted the petition to be filed out of time but denied it on March 4, 1975. Appendix B, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Were petitioners who were charged with conducting an illegal gambling operation at an Eagles Club in violation of 18 U.S.C. 1955 denied a fair trial when counsel for six of the defendants testified as a government witness and invoked the Fifth Amendment when questioned about gambling at the Club.

2. Did the Court direct a partial verdict of guilty on the charge of violating 18 U.S.C. 1955 and conspiring to violate that Statute by charging the jury "that the operation of a commercial gambling establishment is in violation of Georgia law" without telling them what the Georgia law said.

3. Whether petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U.S.C. 1955 and require that the conspiracy convictions be reversed.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix C hereto, *infra*.

STATEMENT OF THE CASE

Defendants were charged with conspiring to violate 18 U.S.C. 1955 and with a substantive violation of 18 U.S.C. 1955.

During the course of trial before the Honorable J. Robert Elliott and a jury, Attorney H. B. Edwards, Jr., who represented petitioners Marcus Randolph Martin, Edwin Eugene Brown and four other defendants, was called as a witness by the government. Mr. Edwards, Jr. was first asked about the operation of the Eagles Club where the alleged illegal gambling took place and he testified extensively in that area. He then was asked a question about the alleged illegal gambling activity at the Club and he replied, "I wish to take the Fifth Amendment. Any evidence I give might incriminate me in some regard." After an unreported side bar conference, Mr. Edwards, Jr. withdrew his claim of privilege and testified at length about gambling activity at the Club. When he completed his testimony, Mr. Edwards, Jr. resumed his role as defense counsel.

In charging the jury on the necessary elements of a violation of 18 U.S.C. 1955, the Court told the jury that they must find a violation of Georgia law but did not read or even paraphrase the Georgia statutes that defendants allegedly violated, but rather instructed the jury that, "I am just going to tell you, as a matter of law, that the operation of a commercial gambling establishment is in violation of Georgia law."

Petitioners Edward Wray Crockett, Jr. and Pleasant Henry Partin were convicted on both counts. Petitioners Edward Crockett, III., Edwin Brown and Marcus Martin were found not guilty on Count One, guilty on Count Two.

REASONS FOR GRANTING THE WRIT

I. Petitioners Were Denied a Fair Trial When One of the Defense Lawyers Was Called as a Prosecution Witness and Invoked the Fifth Amendment.

Petitioners contend that they were denied a fair trial when one of the defense lawyers was called to testify for the government, against the defendants, and in the course of so testifying invoked the Fifth Amendment in response to a question.

Petitioners were charged with operating an illegal gambling business at an Eagles Club in Valdosta, Georgia, where Attorney H. B. Edwards, Jr. had held various offices over a period of years. Mr. Edwards, Jr.'s relationship with the Club terminated approximately two months before Petitioners were indicted.

The Court of Appeals held that as a general rule, a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources, but found that Mr. Edwards' testimony met these requirements.

Obviously troubled, however, by what it termed the "conspicuous" and "overwhelming" impropriety of a defense lawyer testifying against his clients, the Court further found that even if it was error to admit the testimony, it was harmless error.

The general rule relied on by the Court is inapplicable to the instant situation, however, because it is based upon cases where a lawyer is testifying on behalf of his client or where a lawyer calls the prosecuting attorney as a witness for his client, and not where the prosecution calls the accused's counsel as a prosecution witness.

There is no general rule governing the latter situation and, in fact, only two reported cases which have previously considered the question.[1]

The case here is further complicated by the fact that counsel not only testified for the prosecution but also invoked the Fifth Amendment during the course of that testimony. There are no reported cases dealing with that situation.

In trying to apply the rule evolved to deal with the case of a lawyer testifying on behalf of his client to one where a lawyer testifies against his clients and also invokes the Fifth Amendment to the detriment of all defendants, the Court of Appeals became enmeshed in several irreconcilable holdings.

The Court held that any error caused by the testimony was harmless because it was not incriminating as to any defendant and because the other evidence of a gambling operation was overwhelming.

But if the other evidence of the illegal gambling operation was so overwhelming that admitting Mr. Edwards' testimony was harmless error, it could not have been "clearly necessary" to the government's case. And if it showed that defendants had conducted, managed, financed, supervised, directed or owned all or part of an illegal gambling business as the Court said it did, it certainly incriminated them.

The government had the obligation to show and directed its efforts to prove that the activity at the

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[1] *People* v. *Lathrom*, 192 Cal. App. 2d 216, 13 Cal. Rptr. 325, 88 ALR 2d 785 (1961), and *Gunther* v. *United States*, 97 App. D.C. 254, 230 F.2d 222 (1956), both of which held that it is improper and an invasion of the right to counsel to call an accused's attorney as a government witness.

Eagles Club was illegal. Can it be doubted that when one of the lawyers for the defendants, with the unique knowledge of the facts of the case that a jury would naturally attribute to him, refused to testify about gambling at the Club because it might incriminate him, that the jury were convinced that the activity was, in fact, illegal? It was impossible for Petitioners to receive a fair trial under those circumstances.

The question presented is so fundamental to a defendant's right to a fair trial and the Court of Appeals ruling so foreign to that right that this Court should, in the exercise of its power of supervision, reverse petitioners' convictions.

II. The Court Directed a Partial Verdict of Guilty on Counts One and Two.

Petitioners were charged with conspiring to violate 18 U.S.C. 1955 in Count One of the indictment and with violating 18 U.S.C. 1955 in Count Two.

18 U.S.C. 1955 proscribes the operation of an illegal gambling business which is defined in part as one which "is a violation of the state or political subdivision in which it is conducted."

In instructing on the elements of this offense, the Court did not read or even paraphrase the state law which the indictment charged defendants with violating, but rather charged the jury that, "I am just going to tell you, as a matter of law, that the operation of a commercial gambling establishment is in violation of Georgia law."

The Court of Appeals recognized that this instruction standing alone might have given the jury the erroneous impression that the issue of state law violations

was foreclosed from their consideration, but held that the error was corrected by the Court adding:

> "[T]he prosecution . . . ha[s] to prove that it is a violation of the law of the state. Well, I have already charged you that the law of the state of Georgia prohibits commercial gambling enterprises. Now, second, I expressed no opinion about this one way or the other because you are the sole judges of the facts. I am telling you what the law is but you are the sole judges of the facts." (Emphasis Court's)

It is respectfully submitted that this instruction did not cure the error because, while telling the jury they were the judges of the facts, the Court at the same time took away from them the question of whether or not the defendants operated or participated in the earnings of a gambling place. The Court did not tell the jury that they had to find that defendants operated or participated in the earnings of a gambling place before they could find a state law violation, but rather that if they believed the government's evidence, there was a state law violation. The Court thus made the essential determination that defendants operated or participated in the earnings of a gambling place.

It was essential to the government's case that they prove a violation of Georgia law. The Court's instruction decided this material fact as a matter of law adversely to those accused and as such must be regarded as a partial directed verdict of guilty. This is prohibited by the law of the Fifth Circuit as well as prior holdings of this Court. See *Mims* v. *United States*, 375 F.2d 135, 5th Cir. 1967, *Bollenbach* v. *United States*, 236 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, 1946.

The question presented to the Court is important because the effect of the instruction was to deny the defendants the right to have their guilt or innocence determined by a jury as guaranteed by the Sixth Amendment. Petitioners, therefore, respectfully urge this Court to reverse their convictions.

III. It Is Improper To Prosecute and Punish Under Both 18 U.S.C. 371 and 18 U.S.C. 1955 in Light of Wharton's Rule.

The Court granted certiorari in *Ianelli* v. *United States,* No. 73-64, on May 28, 1974, on the question of whether it is improper to prosecute and punish under both 18 U.S.C. 371 and 18 U.S.C. 1955 in light of Wharton's Rule. The case was argued before the Court on December 17, 1974. It is suggested that the Court defer disposition of this petition until after the decision in *Ianelli* v. *United States* or it may wish to grant the petition now and join it with *Ianelli.*

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point raised in this petition because a grant in this case would result in a determination of the right of the government to call defense counsel as a prosecution witness. The ruling of the Court below is so foreign to existing notions of due process that a final determination of the question is of great importance.

Certiorari should likewise be granted as to the second point because the ruling of the Court below invades a defendant's right to a trial by jury.

It is of great practical importance to have a final determination as to how far a court can go in taking

questions away from a jury and deciding them as a matter of law.

On the third question, certiorari should be granted because of the Court's grant of certiorari in *Ianelli* on the same question.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

EDWARD WRAY CROCKETT, JR., EDWARD WRAY CROCKETT, III, PLEASANT HENRY PARTIN, MARCUS RANDOLPH MARTIN, and EDWIN EUGENE BROWN, *Defendants-Appellants.*

No. 73-4011.

January 17, 1975

Defendants were convicted in the United States District Court for the Middle District of Georgia at Valdosta, J. Robert Elliott, Chief Judge, some of conspiracy and operating an illegal gambling business and some of the substantive offense only, and they appealed. The Court of Appeals, Morgan, Circuit Judge, held that defendants were not denied a fair trial because one of their defense counsel was called as a government witness and invoked the Fifth Amendment in response to a question; that the trial court was not required to read or paraphrase definitions of "commercial gambling" or "keeping a gambling place" found in state statute; and that defendants were not denied their right to effective cross-examination because they were not allowed to ask prosecution witnesses where they were living at the time of trial.

Affirmed.

1. WITNESSES

As a general rule, party's attorney should not be called as witness unless his testimony in both necessary and unobtainable from other sources.

2. Witnesses

Where testimony of one of defendant's co-counsel was clearly necessary to Government's case in prosecution for operating an illegal gambling business and testimony was unavailable from any other source, defendants were not denied fair trial when attorney was subpoenaed as prosecution witness and invoked Fifth Amendment in response to question. 18 U.S.C.A. §§ 371, 1955; U.S.C.A. Const. Amend. 5; Code Ga., §§ 26-2702, 26-2703(a), 26-2704.

3. Criminal Law

Even if court erred in allowing prosecution to subpoena one of defendants' counsel and examine him as witness, thus inducing him to invoke Fifth Amendment, error was harmless where attorney's testimony did not incriminate defendants themselves and there was other overwhelming and undisputed evidence of illegal gambling. 18 U.S.C.A. § 1955; U.S.C.A. Const. Amend. 5.

4. Attorney and Client

Where attorney of defendants charged with operating illegal gambling business realized that he was to be prosecution witness, appearance of impropriety was overwhelming and attorney should have withdrawn from case. 18 U.S.C.A. § 1955.

5. Criminal Law

Trial court is not required to define terms which are reasonably within common understanding of juror.

6. Criminal Law

In prosecution for conducting illegal gambling business, trial court was not required to elaborate on state law element of offense either by reading or paraphrasing state statutory definitions of "commercial gambling" or "keep-

ing a gambling place." 18 U.S.C.A. § 1955; Code Ga., §§ 26-2702, 26-2703(a), 26-2704.

7. Criminal Law

Even if trial court's failure, in prosecution for operating illegal gambling business, to define phrases "commercial gambling" and "keeping a gambling place" was error, it was not "plain error" such that reversal was required in absence of request by defendant counsel for such instructions. 18 U.S.C.A. § 1955; Fed. Rules Crim. Proc. rule 52(b), 18 U.S.C.A.

8. Witnesses

Where Government indicated that it had strong reason to believe that witness' life was in danger court's ruling refusing to allow counsel to ask witness where she was living at time of trial was not error.

Appeals from the United States District Court for the Middle District of Georgia.

Before Brown, Chief Judge, and Bell and Morgan, *Circuit Judges.*

Morgan, *Circuit Judge*:

Appellants, among others, were indicted in May, 1973, for violations of 18 U.S.C. § 1955, for operating an illegal gambling business, and of 18 U.S.C. § 371, for conspiracy to violate 18 U.S.C. § 1955. In a jury trial, appellants Edward Crockett, Jr., and Pleasant Partin were found guilty on both counts; appellants Edward Crockett, III, Marcus Martin, and Edwin Brown were found guilty of the substantive offense, but acquitted of conspiracy. The government's theory of the case was that an illegal gambling business had been conducted at the Valdosta, Georgia, Chapter of the Fraternal Order of the Eagles, that Crockett, Jr., had been a principal, that Crockett, III, and Partin had been

managers, and that Partin, Martin, and Brown had been dealers and had otherwise assisted in the business.

Appellants' most compelling argument is that they were denied a fair trial when one of the defense counsel was called as a government witness and invoked the Fifth Amendment in response to a question. This awkward situation resulted from defense attorney H. B. Edwards, Jr's close association with the Valdosta chapter of the Eagles. A co-founder of the group in 1963, Edwards subsequently had served at different times as state trustee, state vice-president, state president, southeastern president, local president and local secretary. He resigned from this last office approximately two months before defendants were indicted. As a result of his experience, he knew a great deal about the operational structure of the local chapter; some testimony on this subject was essential to the government's case because of its need to prove who had authorized and supervised the gambling operation. He was therefore subpoenaed approximately two weeks before trial. Neither he nor any other defense counsel attempted to quash this subpoena or moved for a continuance. Neither was there any objection when he took the stand at trial.

Several of Edwards' answers indicated that he assumed it to be common knowledge that gambling had in fact gone on at the club. For example, when he was asked, "What about the gambling?" he replied, "I didn't have anything to do with the gambling." Again, no defense attorney objected at this time. Nevertheless, when Edwards was asked, "When did you first see card games of poker and blackjack and dice games out at the Eagles Club in Valdosta, Georgia?" his law partner, co-counsel and son, H. B. Edwards, III, objected that, "that is getting into attorney-client privilege." This objection was disallowed, and appellants do not challenge the correctness of the ruling on appeal. When the question was repeated,

Edwards, Jr., replied, "I wish to take the Fifth Amendment. Any evidence I give might incriminate me in some regard." After a conference at the bench, however, he decided, "I will answer the question [sic] as long as they don't involve me in gambling because I wouldn't want to self-incriminate myself." He then stated that gambling had been going on at the club since its formation in 1963.

As a general rule, a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources. United States v. Fiorillo, 376 F.2d 180, 185 (2nd Cir. 1967), Gajewski v. United States, 321 F.2d 261, 268-269, n. 9 (8th Cir. 1963), cert. denied, 375 U.S. 968, 84 S.Ct. 468, 11 L.Ed.2d 416 (1964). *See* United States v. Alu, 246 F.2d 29, 33 (2d Cir. 1957). We feel, however, that the facts of the instant case justified the prosecution in calling Mr. Edwards, Jr. His testimony was clearly necessary to the government's case; in order to prove that defendants had "conduct[ed], finance[d], manage[d], supervise[d], direct[ed], or own[ed], all or part of an illegal gambling business . . .", 18 U.S.C. § 1955, the prosecution needed to show who had been in positions of authority at the Eagles Club during the time when the gambling had occurred. The record does not indicate, nor do appellants claim, that Edwards' testimony was available from any other individual; certainly his experience made him the most likely choice.

Moreover, appellants have made no showing that they were prejudiced either by Edwards' short-lived claim of the Fifth Amendment privilege or by his subsequent testimony. His fear of self-incrimination bore on whether he had been involved in the gambling, not on whether defendants had been. His subsequent testimony did not incriminate any defendant, and appellants do not so contend. Finally, there was overwhelming and undisputed evidence that an illegal gambling operation was going on at the club. A federal agent testified as to his personal participation in

several games of chance and his observation of others on nine separate occasions. Seven other witnesses also testified that they had either observed or participated in various games on at least one occasion. In short, if the court erred in letting Edwards take the stand, even absent any defense objection, it was beyond question harmless error.

Nevertheless, we feel compelled to comment on the conspicuous impropriety of Edwards Jr.'s failure to withdraw from the case when he realized that he was to be a prosecution witness. We are convinced that appellants were not prejudiced by his conduct, but we do not doubt they felt ill-served. As in all areas of legal practice, appearance can be as damaging as reality, and here the appearance of impropriety is overwhelming.

Second, appellants argue the court's instruction to the jury on count two directed a "partial verdict of guilty." In order to be convicted under 18 U.S.C. § 1955, a defendant must be found to have "conduct[ed], finance[d]," etc., a "gambling business" which "is a violation of the law of a State or political subdivision in which it is conducted." Thus, in order to violate federal law, one must first be guilty of violating state or local law. Appellants contention is based on the district judge's failure to read or paraphrase to the jury the pertinent Georgia Code sections making it illegal to conduct a gambling businss in the state. Rather, he instructed them that, "I am just going to tell you, as a matter of law, that the operation of a commercial gambling establishment is in violation of Georgia law." Although this instruction, standing alone, might have given the jury the erroneous impression that the issue of state law violation was foreclosed from their consideration, the judge corrected any possible misunderstanding immediately by adding:

> [T]he prosecution . . . ha[s] to prove that it is a violation of the law of the state. Well, I have already

> charged you that the law of the state of Georgia prohibits commercial gambling enterprises. Now, second, *I expressed no opinion about this one way or the other because you are the sole judges of the facts. I am telling you what the law is but you are the sole judges of the facts.* (Emphasis supplied.)

Clearly, then, the judge did not remove from the jury its prerogative to find the facts; he merely told them that if they found the facts to be as the government contended, then defendants would, as a matter of law, have violated Georgia law. Appellants do not, as indeed they cannot, dispute this.

Since the court did not remove the fact question from the jury, appellants' only contention must be that the jury needed to hear the precise wording of the statute rather than simply that a "commercial gambling business" was a violation of state law. We find no merit in this contention; a trial court is not required to define terms which are reasonably within the common understanding of a juror. Bohn v. United States, 260 F.2d 773, 779 (8th Cir. 1958), cert. denied, 358 U.S. 931, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959) (court not required to define "a person engaged in the business of accepting wagers," "placing bets on both sides of a transaction," or "bookmaker"). We believe "commercial gambling," as used in the Georgia statute,[1] is a phrase of common understanding. The same is true

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[1] "A person commits commercial gambling when he intentionally does any of the following acts:

(a) Operates or participates in the earnings of a gambling place . . ." Ga. Code Ann. § 26-2703(a).

for "gambling" [2] and "keeping a gambling place." [3] The trial court was therefore not required to elaborate on the state law element of the offense, either by reading or paraphrasing the statutory definitions. Finally, we note that defense counsel did not request such elaboration at trial; under Rule 52(b), Federal Rules of Criminal Procedure, any error complained of at this stage must be "plain error." Clearly, even if the court's instructions could have been more thorough, they did not constitute plain error.

Third, appellants contend they were denied their right to effective cross examination because they were not allowed to ask two prosecution witnesses where they were living at the time of trial. They apparently wished to elicit the information that the witnesses were in the custody of the government. Generally, Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931) and Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) require the admission of background information, such as a witness' address, which is essential to identify the witness with his environment, "to place the witness in his proper setting and put the weight of his testimony and his

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[2] "A person commits gambling when he: (a) makes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest; or (b) makes a bet upon the result of any political nomination, appointment, or election or upon the degree of success of any nominee, appointee, or candidate; or (c) plays and bets for money or other thing of value at any game played with cards, dice or balls.. A person convicted of gambling shall be punished as for a misdemeanor." Ga. Code Ann. § 26-2702.

[3] "A person who knowingly permits any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control to be used as a gambling place, or who rents or lets any such property with a view or expectation that it be so used, commits keeping a gambling place. A person convicted of keeping a gambling place shall be punished as for a misdemeanor of a high and aggravated nature." Ga. Code Ann. § 26-2704.

credibility to a test . . .'' *Alford, supra* 282 U.S. at 692, 51 S.Ct. at 219. This court examined this rationale in United States v. Alston, 460 F.2d 48 (5th Cir. 1972), and concluded that no hard and fast rule had been established; we held the case in which a witness might be in physical danger to be an exception to the preference for disclosure. That is precisely our situation here. After the court sustained the government's objection to the first question, a bench conference, outside the presence of the jury, revealed that the government had strong reason to believe the witness' life was in danger, and that she was under the protection of a United States Marshal. The same was true for the second witness.

Finally, appellants, demonstrate no prejudice to have resulted from the court's ruling. Defendants succeeded quite ably in identifying the witnesses with their environment. The first witness testified on cross examination as to her place of birth and prior residences, her marital status and ''affair'' with appellant Crockett, Jr., her place of residence and employment in Valdosta, and payments made to her by the government. The second witness testified as to her previous place of residence in Valdosta, and was cross examined on her enrollment in and was cross examined on her enrollment in and departure from Valdosta State College and her plans to enroll in a nursing school in Miami. We conclude, therefore, that this case falls squarely within the *Alston* exception to the disclosure preference; the court did not err in sustaining the government's objection.

We have examined the other issues by appellants and find them to be completely without merit. The opinion of the district court is therefore

Affirmed.

APPENDIX B

(Caption Omitted In Printing)

ON PETITION FOR REHEARING

(Filed March 4, 1975)

Before BROWN, *Chief Judge*, BELL and MORGAN, *Circuit Judges*. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

18 U.S.C. provides, in pertinent part:

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successsive days, then, for the purpose of obtaining warrants for arrests, interceptions, and and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1252

EDWARD WRAY CROCKETT, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were denied a fair trial when an attorney for several co-defendants, including two of the petitioners, testified as a government witness and temporarily invoked the constitutional privilege against self-incrimination; that the district court in its charge to the jury impermissibly directed a partial verdict of guilty; and that Wharton's Rule precludes an indictment for conspiracy to violate 18 U.S.C. 1955.

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners Edward Wray Crockett, Jr., and Pleasant Henry Partin were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and for conspiring to do so, in violation of 18 U.S.C. 371. Crockett, Jr., was sentenced to concurrent five year terms of imprisonment; Partin was sentenced to concurrent three year terms. Petitioners Edward Wray

Crockett, III, Marcus Randolph Martin, and Edwin Eugene Brown were each convicted of the substantive offense alone; the former was sentenced to three years' probation and a fine of $3,000; the latter two were each sentenced to imprisonment for one year and one day.[1] The court of appeals affirmed all the convictions (Pet. App. 1a-9a; 506 F.2d 759).

The government's evidence established that a sizeable, illegal gambling business was being operated at the Eagles Club in Valdosta, Georgia. Between January 23 and February 27, 1973, Agent George Kenney of the FBI, acting in an undercover capacity, visited the Club to observe the gambling and identify the employees of the Club and their roles in the gambling operation (II Tr. 6-7). At the Club he saw blackjack, poker, "beat-my-shake," "chuck-a-luck," and craps games being conducted both in the main Club building and in a nearby house directly behind the main house (*id.* at 13-14, 44-45). He also saw petitioners Partin, Martin, and Crockett, III, act as dealers in the blackjack games (*id.* at 51-61; 131) and petitioner Brown assist Partin in collecting chips for making payouts to winners in a "beat-my-shake" game (*id.* at 157-161). And he saw petitioners Partin and Crockett, Jr., approving personal checks for the purchase of gambling chips (*id.* at 129). At one point Agent Kenney participated in a craps game in which co-defendant Bruce Fussell stated that "no one loses at Crockett's place" (*id.* at 136). On January 30, 1973, Agent Kenney observed approximately $2,500 worth of chips purchased during a two-hour period at the Eagles Club (*id.* at 110, 116).

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[1]Six other co-defendants were indicted for both conspiracy and the substantive offense. Isaiah Ike Cumbess pled guilty; Thomas Henry DeLoach, Thomas Edward Johnson, Bruce Fussell, Janice K. McBride, and Crystal Sumiako Cannon were convicted on the substantive count only (IV Tr. 68a-69a). William Charles Steele, Jr., indicted on the substantive count only, was acquitted by the jury (*id.* at 69a).

Additional government evidence disclosed that gambling had been taking place at the Valdosta Eagles Club since 1963 (III Tr. 247). In 1970 or 1971 the Club started keeping a percentage of the money accumulated from the betting (*id.* at 249). Petitioner Crockett, III, was the president of the Club during 1970-1971 (*id.* at 258). The manager of the restaurant at the Eagles Club during the relevant period observed petitioners Partin and Crockett, III, dividing the money which had accrued from the illegal gambling (*id.* at 478-480). Penny Fennell, a friend of petitioner Crockett, Jr., testified that he told her that he was the owner of the Eagles Club, that he wanted to hire her because he thought she would be good to work the "chuck-a-luck" game, and that although he knew that the gambling operation at the Club was illegal he was not worried about it (*id.* at 531-532, 538-539).[2]

1. Petitioners contend that they were denied a fair trial by the temporary invocation of the privilege against self-incrimination by an attorney for several of the defendants, including petitioners Martin and Brown,[3] who was called to testify as a government witness. This claim was carefully considered and correctly rejected by the court of appeals. It raises no issue outside the confines of this case warranting further review.

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[2]Several customers of the Eagles Club testified about their gambling activities at the Club, the types of games offered, the procedures followed, and the amount of money lost at the Club (IV Tr. 32, 72-75, 90-95, 106, 124).

[3]The other six defendants were represented by seven other attorneys.

Counsel of record for defendants DeLoach, Martin, Brown, Johnson, Fussell, and Cannon was H. B. Edwards, III. His co-counsel and father, H. B. Edwards, Jr., who was called to testify by the government, had been a co-founder of the Valdosta chapter of the Eagles Club in 1963 and had subsequently served at different times as state trustee, state vice-president, state president, southeastern president, local president, and local secretary of the Club (III Tr. 213-214). He held the latter position during the period in which the illegal gambling existed: approximately two months prior to the defendants' indictment he had resigned the post (*ibid.*).

Edwards testified extensively about his various positions in the Eagles Club and the operations of the Club in general (III Tr. 213-241). In connection with inquiries into the Club's revenues, the prosecution asked, without objection, "What about the gambling?" and Edwards replied, "I didn't have anything to do with the gambling" (*id.* at 241). The prosecution then asked, "How long had the gambling been in the Club, Mr. Edwards?" He answered, "I used to play slot machines out there" (*id.* at 242). At this point Edwards, III, objected on the ground that the attorney-client privilege was being infringed, but Edwards, Jr., without waiting for the court's ruling, said "Well, the statute of limitations has run on the misdemeanor of playing slot machines" (*ibid.*) and continued his testimony.

The prosecution next asked (*id.* at 242-243), "Mr. Edwards, when did you first see card games of poker and blackjack and dice games out at the Eagles Club in Valdosta, Georgia?" Again Edwards, III, objected on attorney-client privilege grounds (*id.* at 245). The court allowed the question, and Edwards, Jr., responded:

> Well, your Honor, in this case, I wish to take the Fifth Amendment. Any evidence I give might incriminate me in some regard. In regard to this, I take the Fifth Amendment to the Constitution of the United States in regard to that question.

The court said, "All right. He declines to answer that." A bench conference and then a brief recess followed. When trial resumed, Edwards, Jr., offered the following statement (*id.* at 246):

> Your Honor, with your permission, and since I am an officer of the Court, I wish to withdraw my averment to the Fifth Amendment. I will answer the question. I will answer the question as long as they don't involve me in gambling because I wouldn't want to self-incriminate myself.

Edwards then testified that gambling had been going on at the Club since its founding in 1963 (*id.* at 247). He was thereafter cross-examined extensively by three other defense attorneys.

As the court of appeals noted (Pet. App. 5a), Edwards' fear of self-incrimination bore on his own involvement in the gambling operations at the Club, not on the defendants' complicity. His testimony did not directly implicate any of the defendants, and, as the court ruled, petitioners cannot show that his fleeting invocation of the constitutional privilege prejudiced them in any significant way before the jury. Edwards' testimony was "reasonably necessary," *United States* v. *Fiorillo*, 376 F. 2d 180, 185 (C.A. 2), no objection was made when he was called to the stand, and petitioners do not claim that they were unaware that he had been subpoenaed two weeks prior to trial (Supp. R. 2-3)[4] (or indeed that they did not know that he had

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[4]"Supp. R." refers to the Supplemental Record forwarded to the court of appeals at the government's request.

testified several months earlier before the federal grand jury investigating the case (*ibid.*)). Under these circumstances, and given the other overwhelming evidence of petitioners' guilt, the court of appeals was correct in holding (Pet. App. 6a) that the allowance of Edwards' testimony was not prejudicial error. See *United States* v. *Fiorillo, supra.*

2. Petitioners contend also that the trial court improperly directed a partial verdict of guilty by charging the jury as a matter of law that the operation of a commercial gambling establishment is a violation of Georgia law.

Under 18 U.S.C. 1955 it is illegal for five or more persons to conduct, finance, manage, supervise, direct or own a gambling business that is illegal under state law and that continues in operation for a period of thirty consecutive days or has a gross revenue of $2,000 or more in any single day.[5] Under Georgia law it is illegal for any person knowingly to permit any real estate owned by him or under his control to be used as a gambling place,[6] or to be involved in commercial gambling where he intentionally operates or participates in the earnings of a gambling place or receives, records, or forwards a bet or offer to bet.[7]

After telling the jury that the Georgia Code provisions relating to gambling were lengthy and involved, the district court charged that "as a matter of law * * * the operation of a commercial gambling establishment [as defined in Section 1955] is in violation of Georgia law" (V Tr. 29a).

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[5]The government's evidence established that more than five persons were involved in the operation of the gambling venture and that $2,000 in gross revenues were accrued in a single day (II Tr. 116).

[6]Ga. Code Ann. §26-2704 (1972).

[7]Ga. Code Ann. §26-2703 (1972).

The court immediately made clear, however, that "they [the prosecution] have to prove that it [the defendants' conduct] is a violation of the law of the state * * * . I expressed no opinion about this one way or the other because you are the sole judges of the facts" (*ibid.*). In short, the district court did not take away from the jury any relevant issue of fact essential in resolving the defendants' guilt or innocence. See *United States* v. *Hayward*, 420 F.2d 142, 144 (C.A. D.C.); *Carothers* v. *United States*, 161 F.2d 718, 722 (C.A. 5). Moreover, no objection was made to this aspect of the court's charge, and the court of appeals was correct in ruling that, even if the charge might have been more thorough, failure to read the Georgia code *in haec verba*[8] was not plain error. Rule 52(b), Fed. R. Crim. P.

3. Petitioners Partin and Crockett, Jr., convicted on both the substantive and conspiracy counts, contend that Wharton's Rule is a bar to an indictment for substantive violation of Section 1955 and conspiracy to commit the violation. *Iannelli* v. *United States*, No. 73-64, decided March 25, 1975, resolved this issue to the contrary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[8] The trial court is not required to define terms which are reasonably within the common understanding of a juror. *Bohn* v. *United States*, 260 F.2d 773, 779 (C.A. 8), certiorari denied, 358 U.S. 931. Here the terms "commercial gambling" (Ga. Code Ann. §26-2703(a) (1972)), "gambling" (Ga. Code Ann. §26-2702 (1972)), and "keeping a gambling place" (Ga. Code Ann. §26-2704 (1972)), are sufficiently within common understanding to preclude the necessity of definition.